No. 11023

In the United States Circuit Court of Appeals for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

PATRICK LUMBER COMPANY (A CORPORATION), APPELLEE

REPLY BRIEF FOR APPELLANT

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Appellee's brief consists almost entirely of statements that are either (a) irrelevant or (b) inaccurate and misleading.

1. Thus a large part of his argument is devoted to showing that the prices established by the Administrator through the Price Executive of the Lumber Branch pursuant to application under Section 12 of the Regulation and asserted by the Administrator to be applicable to the lumber sales in this suit, were invalid because "arbitrary" in amount, and based on "usurped authority" and "unwarranted assumptions" (Brief, pp. 18–21), or were invalid because of allegedly unconstitutional retroactivity (Brief, pp. 23–26). This attack on the validity of the prices established under Section 12 is irrelevant to the issues here because the validity of prices established under the Emergency Price Control Act can be attacked only in the Emer-

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gency Court of Appeals (Sec. 204 (d) of the Act) as has been repeatedly held by the Supreme Court (*Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503; *Bowles* v. *Seminole Rock and Sand Co.,* 65 S. Ct. 1215) and by this Court (*Taylor* v. *United States,* 142 F. (2d) 808; *Bowles* v. *Sanden and Ferguson,* 149 F. (2d) 320; *Bowles* v. *Case,* 149 F. (2d) 777, *Bowles* v. *Wheeler,* August 1, 1945 — F. (2d) —).

2. Equally irrelevant is the argument on pp. 14–17 which (in view of the heading) is designed to show that the lumber sales involved in this suit were subject to the provisions of Table 2 of the Regulation. Appellee attempts to prove this proposition as to *applicability* of Table 2, by attempting to show at some length that he *in fact used Table 2* in arriving at the prices charged; that the prices charged were reasonable because not higher than Table 2 prices (Brief pp. 14–15) and in some instances allegedly less (Brief, pp. 15–17).

It is not difficult to see why Appellee had to deal in irrelevancies in arguing that Table 2 was applicable. Nothing could be clearer than that Table 2 did not apply to lumber surfaced on one side and two edges (S1S2E) to 1½″ thickness, as was the lumber involved in this suit. The text of the Table (which by its heading applied only to "No. 1, Green, Rough or S4S, A. L. S."—see Administrator's Main Brief, p. 8) was inapplicable, and the prices established in the notes for the various qualities here sold ("select structural," "select merchantable," etc.) and for the

S1S2E surfacing involved (Note 23) were also inapplicable—since all *dimension lumber, of whatever quality or surfacing, has a standard, minimum thickness when surfaced at all, of 1⅝"* (American Lumber Standards, Exhibit 1, R. 61–62, 70–71; Grading Rules, Exhibit 2, p. 142; R. 70). The lumber standards and grading rules in the preceding citation are made applicable by Section 22 and Table 2, Note 23 of the Regulation. (See Administrator's Main Brief, pp. 8, 11.)

3. The Appellee's argument against the applicability of Section 12 of the Regulation (Brief, pp. 8–11), while not irrelevant, does fail to come to grips with the Administrator's position as outlined in his main brief. Appellee argues generally that the term "grade" is used elsewhere in the Regulation and in the Grading Rules so as not to include the idea of a substandard specification. This does not refute the Administrator's contention that the word must not in Section 12 be given the narrow meaning because:

(a) In conjunction with the inapplicability of Table 2, previously shown, a narrow meaning of "grade" in Section 12 would result in leaving all substandard specifications *unpriced*—a result inconsistent with the clear and unqualified language of Section 2 ("This regulation covers all Douglas fir" and "The regulation applies whether the particular item is specifically priced in the price tables or not"). It is elementary that all provisions of a statute or regulation must be read together, so as to give effect to all provisions and reconcile any apparent inconsistencies. The Administrator's construction does this. The appellee can-

not do this, except by asserting that Table 2 applies—a conclusion flatly contradicted, as we have indicated, by the restriction in Table 2 to dimension lumber of 1⅝" minimum thickness when surfaced.

(b) It is established law, as shown in the Administrator's main brief, that "literal" meanings of statutes or of written documents generally are not accepted by courts when they lead to absurdly unreasonable consequences and there is adequate basis for believing another meaning was intended. Applicability of this principle is demonstrated not only by the considerations previously cited (of internal inconsistency, and the virtual exemption of dimension lumber from price control by indirectly inviting the manufacture of ceiling-free, substandard specifications) but also by reference to the history of the regulation, showing a clear intent to cover these sales by Section 12. As shown in the Administrator's main brief (pp. 17–21) sales such as these had, prior to the present Revised Regulation, *always* been covered by the Douglas fir lumber regulations in a section comparable to the present Section 12; i. e., a section requiring application for approval of prices for special items—but using different language; and no intent is seen in the Statement of Considerations for the Revised Regulation, or otherwise, to make the striking departure contended for by appellee. Indeed the word "grade" and the word "addition" were used and officially construed, in this prior period of regulation, in a manner similar to that in which the Administrator contends these same words should be construed in

Section 12. Appellee was subject to regulation then, and knew or should have known the clear administrative intention at that time. He has had no reason to surmise a change in intent.

(c) If the changed language of the Revised Regulation raised any doubts in appellee's mind he could have had them removed by inquiring of the Office of Price Administration. That the intent of the present Regulation is in fact clear, is eloquently attested by the fact that the West Coast Lumbermen's Association itself took the initiative in seeing that action was taken upon appellee's violation. As the appellee himself has recognized in his brief (p. 3), the Record shows that "the apparent source and motive of this action came from West Coast Lumbermen's Association."

(d) In view of the indicated history of the Regulation, its official interpretations, and the continuing availability of the Office of Price Administration for interpretation; in view of the apparent understanding of its meaning by the industry generally; in view of the completely untenable construction placed upon Table 2 by appellee; and in view of the further fact that (under Section 205 (e) of the Act) if appellee can show that the violation was free from wilfulness and did not result from a failure to take practicable precautions, his liability is limited to the *single overcharge*—it can hardly be argued that a businessman conscious of his wartime responsibilities is here being *"penalized"* for *bona fide, reasonable* belief that the Regulation permitted the conduct complained of.

4. In conclusion, the Court's attention is called to certain misleading statements in the appellee's brief. On pp. 13–14, he argues that the Regulation required the Administrator to act upon price-applications under Section 12 within 30 days of the receipt of the application, and the Administrator failed to do so here. The authority cited for this is Amendment 9 of the *original* Regulation. It is difficult to see what comfort appellee can derive from this, since there is no such provision in *Revised* Maximum Price Regulation 26, which is applicable to this case. (See Administrator's main brief, p. 12.)

Again, on pp. 11–13 of his brief, appellee argues that the Grading Rules permit a 1/8" variation under the "nominal" 2-inch size, citing Rules 92–94. These Rules do not help him in the least, as is apparent from their face. They are variations permitted from the standard, "nominal" or rough (i. e. unsurfaced) sizes applicable to a product resulting from sawing. In other words, when a 3" plank is sawed so that a 1 7/8" piece of dimension lumber results, this 1 7/8" piece could with propriety be called 2" nominal (i. e. 1/8" variation below the 2" nominal would be permitted). But nothing in Rules 92–94 or any other Rules states that 1/8" variation below the standard thickness of 1 5/8" is permitted for the product resulting from *surfacing* the nominal 2-inch dimension. Lumber is surfaced to exact specifications. Such exactitude is not required for sawn lumber. (And the 1/8" tolerance permitted, in the above example, is small enough to permit surfacing to the standard 1 5/8" thickness.)

CONCLUSION

It is submitted that the appellee's brief (which is completely barren of authorities) has failed to refute the Administrator's contentions, and is replete with irrelevant and misleading observations. The judgment should be reversed.

Respectfully submitted.

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